



POLICE DEPARTMENT

March 28, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michele Herbst
Tax Registry 930338
83 Precinct
Disciplinary Case No. 84329/08

Police Officer Michael Leun
Tax Registry 894739
83 Precinct
Disciplinary Case No. 84330/08

The above-named member of the Department appeared before me on March 3, 2011, charged with the following:

Disciplinary Case No. 84329/08

1. Said Police Officer Michele Herbst, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0345 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a dispute between shelter employees and an apparently intoxicated or emotionally disturbed woman repeatedly attempting to gain entry to said shelter, did fail and neglect to render all necessary police service in said dispute, in that said Police Officer failed to conduct a proper investigation, left the scene without reaching a resolution of said dispute, and failed to have said woman promptly removed from the scene to receive medical treatment. *(As amended)*

P.G. 201-21, Page 1, Paragraph 8 – POLICE OFFICER DUTIES AND RESPONSIBILITIES

P.G. 216-05, Pages 1 and 2 – MENTALLY ILL OR EMOTIONALLY DISTURBED PERSONS AIDED CASES

2. Said Police Officer Michele Herbst, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0345 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a

COURTESY • PROFESSIONALISM • RESPECT

dispute between shelter employees and an apparently intoxicated or emotionally disturbed woman repeatedly attempting to gain entry to said shelter, did communicate with the central radio dispatcher and wrongfully report the "job" as "91 – non-criminal condition corrected" (*As amended*)

P G 202-21, Page 1, Paragraph 13 – POLICE OFFICER DUTIES AND RESPONSIBILITIES

3 Said Police Officer Michele Herbst, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0350 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a dispute between shelter employees and an apparently intoxicated or emotionally disturbed woman repeatedly attempting to gain entry to said shelter, and having observed another Police Officer wrongfully push or strike said woman, causing her to fall to the ground, wrongfully did fail and neglect to notify the Internal Affairs Bureau, Command Center, as required (*As amended*)

P G 207-21, Page 1, Paragraph 1 – ALLEGATIONS OF CORRUPTION AND SERIOUS MISCONDUCT AGAINST
THE SERVICE
COMPLAINTS

Disciplinary Case No 84330/08

1 Said Police Officer Michele Herbst, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0345 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a dispute between shelter employees and an apparently intoxicated or emotionally disturbed woman repeatedly attempting to gain entry to said shelter, did fail and neglect to render all necessary police service in said dispute, in that said Police Officer failed to conduct a proper investigation, left the scene without reaching a resolution of said dispute, and failed to have said woman promptly removed from the scene to receive medical treatment (*As amended*)

P G 201-21, Page 1, Paragraph 8 – POLICE OFFICER DUTIES AND RESPONSIBILITIES

P G 216-05, Pages 1 and 2 – MENTALLY ILL OR EMOTIONALLY DISTURBED PERSONS AIDED CASES

2 Said Police Officer Michael Leun, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0345 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a dispute between shelter employees and an apparently intoxicated or emotionally

disturbed woman repeatedly attempting to gain entry to said shelter, did communicate with the central radio dispatcher and wrongfully report the "job" as "91 – non-criminal condition corrected" (*As amended*)

P G 202-21, Page 1, Paragraph 13 – POLICE OFFICER DUTIES AND RESPONSIBILITIES

3 Said Police Officer Michael Leun, while assigned to the 83rd Precinct, on or about June 29, 2007, at about 0350 hours, in front of a homeless shelter located at 1245 Broadway, Kings County, New York, having responded to and become aware of a dispute between shelter employees and an apparently intoxicated or emotionally disturbed woman repeatedly attempting to gain entry to said shelter, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer wrongfully pushed or struck said woman, causing her to fall to the ground (*As amended*)

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

The Department was represented by David Green, Esq , Department Advocate's Office, and respondents were represented by John Tynan, Esq

Respondents, through their counsel entered plea of Not Guilty to the subject charges A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

Disciplinary Case No 84329/08

Respondent Herbst is found Guilty of Specification No 1 and Not Guilty of Specification Nos 2 and 3

Disciplinary Case No 84330/08

Respondent Leun is found is found Guilty of Specification No 1 and Not Guilty of Specification Nos 2 and 3

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department placed into evidence a digital video recording taken from a security camera mounted outside the entrance to 1245 Broadway, Brooklyn, New York [Department Exhibit (DX) 1]

The Respondents' Case

Respondents testified in their own behalf

Respondent Michael Leun

Respondent Leun was appointed to the Department in 1988 and is assigned to the 83 Precinct. On June 29, 2007, he was working a 11 15 p.m. to 7 50 a.m. tour on patrol with his steady partner at that time, respondent Herbst. He stated that they would respond to the shelter at 1245 Broadway "once, twice three times a week." The building is located at Greene Avenue and Broadway, with the entrance on Greene Avenue.

At about 3 45 a.m., they received a radio run to the shelter, which was outside of their sector. They responded because that sector car was busy. To the best of his recollection, the call came over as a dispute. When they got there, Edith Rivera was inside the shelter and had been told by shelter employees that she was not allowed to stay because she was under the influence of alcohol and that violated the rules. Rivera stepped outside and spoke with respondents. The conversation lasted about ten minutes.

Rivera, respondent said, was irate but not irrational. She was angry because she was being put out of what is, in essence, her home. Respondent has had occasion to get

medical attention for emotionally disturbed persons (EDPs) He did not believe that Rivera was an EDP Emergency medical technicians (EMTs) arrived on the scene and they told respondent that they did not believe she was a danger to others

At some point, respondents determined that the job was done They had told Rivera to leave the shelter and she had done so with no attempts to get back in Rivera had told them she was going to a friend's house Respondent Leun also noted that a supervisor had stopped by in an unmarked car and he had conferred with that supervisor

He stated the central dispatcher was notified that the disposition of the job was 91, non-crime corrected " He and respondent went back to their radio motor patrol car (RMP) to head to another job, "a 30 series job, which he explained was in essence a crime in progress Respondent Leun explained that the RMP was parked about 50 feet from the shelter door As they drove by the shelter, he saw that a shelter employee had the shelter door open and was saying something to Rivera and respondent Herbst Respondent Leun stopped the RMP opposite the shelter door and respondents exited the RMP

Respondent Leun observed his partner talking to the shelter employee and Rivera walking up to respondent Herbst's side He said he put his arm up to stop Rivera from going up to his partner or entering the shelter and she fell backwards

Explaining his next actions respondent Leun stated, "We turned, realized there was no injury, she was still upset, irate as she was earlier We turned and responded to the 30 series job ' Respondent Leun indicated that Rivera was back on her feet before they drove off

After they left the scene, a call of another job at the shelter came in about two minutes later. Respondents returned to the shelter. Rivera was "[a] lot more upset. EMTs were also on the scene and they determined that she was to be hospitalized because of her intoxicated condition. She did not go voluntarily, was flailing her arms, and had to be restrained.

Respondent Leun was subjected to an official Department interview about three months after the incident. However, the first time he saw the video (DX 1) was about three years after the incident. He had requested to see it at his official Department interview but was told that he could not.

On cross-examination, respondent Leun agreed that Rivera was intoxicated. He had not seen shelter employees with a bottle of vodka. She did not seem unsteady on her feet and "she was walking around fine with her walker." She was agitated. Respondent Leun agreed that she had said that she was going to a friend's house. They did not ask for a name to verify who the friend was. When he stopped the RMP the second time, it was because the shelter door was ajar. As that door can only be open from the inside, the shelter employee had to have opened it. He did not see Rivera try to enter the shelter. He stated that even if she was intoxicated, he could not kick her off the sidewalk and that is what he meant when he called in the job as "non-crime corrected." It was not until the second radio run that he determined that Rivera was not going to a friend's house.

Respondent Leun stated that he did not push Rivera down intentionally. He said that he did not know if he was injured and that she was still quite upset and said, "[G]et away from me." He stated, "At that point we decided to go away and go to the 30 series

job ” There was no indication that Rivera was in pain He did not stop to help her get up because it was more important to go to a priority job

Respondent Michele Herbst

Respondent Herbst has worked at the 83 Precinct for about eight of the nine years she has been with the Department On June 29, 2007, she and her partner, respondent Leun, responded to a job at the shelter at 1425 Broadway, Brooklyn She remembered seeing the shelter security guard and Rivera at the Greene Avenue entrance to the building when they arrived Rivera was yelling but she was not an EDP

Respondent Herbst went to the security guard, who explained that there are rules and that Rivera had come back after curfew and they would not let her into the shelter until morning Rivera was intoxicated but she was not a danger to herself and she was angry that she could not get into the shelter

Respondent Herbst said she went over the shelter rules with Rivera many times During this time, other police officers and EMTs arrived After about ten minutes respondent Herbst felt they had resolved the situation as Rivera said she would go to a friend's house At that point, she and her partner returned to their RMP and she as the recorder, transmitted the disposition on the radio for the job as “91, non-crime corrected ” She noted that there had been no criminal activity

Respondent Herbst testified that after they transmitted the disposition of the job, they proceeded to move up in the RMP She saw that Rivera was still at the door and she told Rivera that she had to go to the friend's house She got out of the RMP and told the security employees that if there were further problems, they could call again Respondent

Herbst stated that, at that point, Rivera started to approach her and she recalled respondent Luen stepping in between her and Rivera. While she was talking to the shelter employees, respondent Luen told her that they had to go to another job. They then left.

Respondent Herbst stated that she did not know, at that time, that Rivera had fallen. She stated that she only learned that when she saw the video (DX 1). While she was told the video existed at her official Department interview, she did not see it at that time.

After they left the scene, respondents went back a few minutes later. Respondent Herbst did not know that, in the intervening period, Rivera had been punched in the face. She did not learn that until she saw the video. However, when they got back to the shelter, Rivera was very different, yelling and screaming. EMTs were on the scene and she told Rivera that she had to go to the hospital. Rivera would not move and the EMTs would not bring the stretcher to her, they left it a few feet away. Respondent Herbst said she had to bring Rivera to the stretcher. Respondent Herbst had on short sleeves and Rivera scratched her (respondent Herbst's) arms while they strapped Rivera in the stretcher.

Respondent Herbst stated she did not see any misconduct that she had to report to the Internal Affairs Bureau (IAB).

On cross-examination, respondent Herbst said that when Rivera fell to the ground, she was not facing her but facing the doorway. She said she believed her partner was between them. She did see that Rivera had fallen to the ground on the video but she did not recall seeing it at the time and was very surprised when she viewed it on the video.

FINDINGS AND ANALYSIS

This case involves an incident that happened while the two respondents were partners on uniformed patrol in an RMP on the midnight tour in the 83 Precinct. They were called to a shelter for homeless women located at 1245 Broadway in Brooklyn at about 0345 hours. A very intoxicated woman, Edith Rivera, wanted to enter the shelter. She was being denied admission by shelter employees because it was after hours and she was very intoxicated. The entire incident that is the subject of these charges has been captured on a 16-minute security video (DX 1).

The video is taken from a camera that appears to be mounted on the building to the left of and above the entry door to the shelter. Although the building lists an address on Broadway, the entry door is on a side street, Greene Avenue. The video captures an area of sidewalk outside the entry door and extends out into the street opposite the door. The camera is stationary and while the picture is clear, it is somewhat grainy and lacks detail. Additionally, the image appears to be the product of a fish-eye lens designed to capture a large range of vision but which produces some distortion.

The shelter employee and Rivera can be seen exiting the building. The two respondents, who parked their car down the block as they approached the shelter, can be seen entering the area near the door on foot. There is a long conversation mostly involving respondent Herbst speaking with Rivera. An unmarked police vehicle appears on the street and respondent Leun is seen walking over to talk to the officer or officers inside. A short time later, another RMP parks opposite the door to the shelter and two additional uniformed officers join the two respondents in the area of the doorway.

Two EMTs also are seen arriving in the vicinity of the doorway on foot. At some point, about ten minutes after respondents first arrived, the second set of officers drive off in their RMP. The EMTs leave the scene and their ambulance can be seen driving off down the block. Then, the two respondents walked back in the direction from which they came.

Rivera is still in the vicinity of the shelter door and the shelter employee can be seen going in and out of the door. Respondents' RMP enters the field of vision and stops opposite the door. The two respondents exit the vehicle.

At some point, respondent Leun seems to come into some kind of physical contact with Rivera and Rivera falls to the ground. While she is still on the ground, both respondents get in the RMP and leave the scene. This conduct contained in the video to this point is the subject matter of the charges. It should be noted that there is no audio recording of these events. There is, however, general agreement that Rivera was both loud and vocal. She can be seen gesticulating with her arms during the various conversations captured by the video.

There is an additional segment of video showing what happened after respondents leave the scene. That sequence shows Rivera slamming her walker into the side of the building. Subsequently two shelter employees come out to deal with Rivera. One employee can be seen making a telephone call, apparently to 911. At one point, one of the shelter employees appears to move back either because Rivera has hit him or because she has moved too close to him. It then appears that that shelter employee may have hit Rivera because she again falls to the ground. Shortly thereafter the video ends.

Respondents returned to the scene a few minutes later. At that time, they determined that Rivera was an EDP. It is unquestioned that, at that point, respondents properly restrained Rivera and had her hospitalized. Respondent Herbst received scratches from Rivera during her efforts to get her strapped properly to a stretcher. No video was available for this portion of the incident.

Rivera was taken to the hospital. She had a fracture to her arm. It was discovered that she had prior contacts with the criminal justice system as well as an outstanding warrant.

Specification Nos. 1 and 2 as to both respondents are identical. Specification No. 1 alleges that respondents "failed to render all necessary police service in that [they] failed to conduct a proper investigation, left the scene without reaching a resolution of [the] dispute and failed to have [Rivera] promptly removed from the scene to receive medical treatment." Specification No. 2 alleges that they "wrongfully" reported the "job" as "91" meaning that a non-crime condition had been corrected.

Specification No. 3 as to both respondents deals with that portion of the incident in which respondent Leun came in contact with Rivera causing her to fall and apparently hurt her arm. This specification as to Leun charges him with "wrongfully" pushing or striking her while respondent Herbst is charged with failing to report respondent Leun's conduct to IAB.

As can be seen, Specification No. 1 has three separate components which are reorganized here to facilitate the analysis: 1. the alleged failure to conduct a proper investigation, 2. the alleged failure to "promptly" remove Rivera from the scene to

receive medical treatment, and 3 leaving the scene without reaching a resolution of the dispute

There are also two separate segments to the incident regarding the interaction between respondents and Rivera. The first segment is that part of the incident which went from the time respondents arrived at the scene until the time they walked back to their RMP. The second segment of the incident occurred when respondents, while driving down the block, stopped the RMP opposite the door, exited the RMP and again confronted Rivera. The Department has made arguments that apply the charges to both of these segments. This Court is of the view that what occurred here is best understood by looking at each of these segments separately.

The first segment of the incident

There is a complete absence of evidence or argument to establish that respondents failed to investigate the incident at this point. The issue was very straightforward, Rivera wanted to enter the shelter and was being denied that access because she was in violation of the rules due to her intoxication and due to the late hour. Respondent Herbst spent the better part of ten minutes talking to her and apparently ascertained that she had an alternate place to go for the balance of the night. There is no evidence to indicate that there was any failure to investigate at this point in time.

The allegation that respondents left the scene without reaching a resolution of the dispute raises more complicated issues. There came a point, about ten minutes after their arrival, that respondents left the scene. They were preceded in their departure by two other uniformed officers and the two EMTs. Although it might have been better, looking

at the matter with hindsight, to wait until Rivera had walked away from the shelter, the determination by respondents that the incident was over seems justified as other responders left the scene at that point, obviously convinced that Rivera was about to leave

The next aspect of this same complicated issue involves the allegation that respondents failed to remove Rivera from the scene to receive medical treatment. Again, it is not clear exactly what the Department meant by this. There was some intimation that they should have found Rivera to be an EDP at that point in time and had her involuntarily taken to the hospital as such. Both respondents testified that she did not appear to be an EDP at that point in time and that her problem seemed to be intoxication. The standard for involuntary psychiatric hospitalization is that person presents a danger to herself or others. There is absolutely nothing on the video to demonstrate that Rivera met that standard during the first encounter. This part of the allegation demonstrates some of the difficult decisions facing officers on patrol. Had the officers attempted to "EDP her" at that point, they could as easily be charged with inappropriate conduct as they apparently have been, at least in part, for failing to do so. The fact that sometime later they determined that Rivera was an EDP is of no consequence. The behavior of someone who is unstable can change or manifest itself in different ways at different times.

In sum, there is no evidence of any misconduct by respondents up to the point that they left the scene the first time. It was at that point that they called in the disposition of the job as a "91" indicating that a non-crime condition had been corrected. That call, at that time, seems to have been accurate.

The second segment of the incident

Moments later, as they were driving past the doorway, they stopped again and got out the RMP. Rivera was still on the scene and there was an interaction with her in which she wound up on the ground. The two respondents can be seen leaving the scene with Rivera on the ground. This is unacceptable and this is where the problem lies.

Before dealing with the specifications as they relate to this event, it is necessary to deal with one factual issue. Respondent Herbst testified that she did not remember seeing Rivera on the ground. Respondent Herbst was not shown the video at her official Department interview and stated that the first time she learned that Rivera was on the ground was when she finally saw that video in preparation for this case.

Both officers have responded numerous times to the homeless shelter and several years have passed since the incident. The possibility that respondent Herbst did not remember seeing Rivera on the ground at the time of her testimony is certainly possible. It is difficult, bordering on impossible, to imagine that she was not aware of it at the time.

While she may not have seen the initial incident which caused Rivera to go to the ground because respondent Leun, who is a large person, was standing between them, she certainly should have noticed as they were headed toward the RMP. Clearly, they had stopped and exited the RMP to address the fact that Rivera was still at the door. It is unimaginable that respondent Herbst again left the scene without visually inspecting to make sure that Rivera was at least in the process of moving away from the door. In sum, this Court finds that respondent Herbst knew or should have known, at the time, that Rivera was on the ground. Leun, for his part, does not deny knowing this fact.

Respondents should have remained to determine what Rivera's condition was, to see if she needed help and, if necessary, to see that she was not going to create more problems, that is, to insure, within reason, that the incident was over. Further, there is reason to believe that it was during this fall that Rivera fractured her arm as she can be seen holding it immediately after the incident.

The explanation offered by respondents that they had another radio run is unavailing. They needed to take action to complete what they were doing and in fact they had to come back to the scene in a few minutes as the result of a second call from the shelter as the situation deteriorated immediately after they left.

The failure to investigate at this point relates to the failure to make a simple inquiry of Rivera to determine if she was alright. The failure to insure that the matter was resolved is also established because there was no plan either to get Rivera medical attention, if it was needed, or to insure that she followed through on her stated plan to leave the scene and go somewhere else for the night, if she declined medical attention. Respondents are therefore found Guilty of Specification No. 1.

As noted previously, the un-contradicted testimony is that the call to the central dispatcher declaring the radio run a resolved non-crime, was made after respondents left the scene the first time. At that moment, it was a proper call. A few minutes later, respondents stopped again as Rivera was still in the area. Had they done what they should have done at that point, it may have been necessary to re-open the case at that time. On the other hand, it may not have been.

We do not, for instance, know that Rivera injured her arm at that point in time. She may have because she can be seen holding it after the incident but she may have hurt

it later when she was pushed or fell down after contact with the shelter employee. If she was injured at the time, the officers would have had to make a new call to the central dispatcher. However, if she was not injured and agreed to leave the scene, then another call would not have been necessary. All of this involves speculation regarding what would have happened if the officers had acted appropriately. That misconduct is addressed in Specification No. 1, of which respondents have been found guilty.

Because reporting the job "91" was apparently appropriate at the time it was made and because it can only be speculated as to whether it should have been rescinded or corrected, respondents are found Not Guilty of Specification No. 2.

Specification No. 3 deals with the allegedly "wrongful" conduct by respondent Leun involving a "pushing or striking" of Rivera, causing her to fall to the ground. The Department does not allege that respondent Leun acted intentionally. Looking at the video, there is insufficient basis to say that he used anything more than a reasonable amount of force to open the door. The fact that she fell to the ground is easily as much attributable to her intoxicated condition as it is to respondent Leun's conduct. The notion that his conduct was somehow wrongful is not established. Respondent Leun is found Not Guilty of Specification No. 3 in his case.

As to respondent Herbst, as this Court noted earlier, there is reason to believe that she did not see Rivera fall or how it occurred. This belief is not based on her testimony but on the video, where it appears that respondent Leun is standing between respondent Herbst and Rivera, blocking his partner's view. Even if she did, as noted above, there is no evidence that respondent Leun engaged in misconduct when the fall occurred. There

is no evidence that Herbst had a reason to call the IAB command center Respondent
Herbst is found Not Guilty of Specification No 3 in her case

PENALTY


In order to determine an appropriate penalty, respondents' service records were
examined, see *Matter of Pell v Board of Education* 34 N Y 2d 222 (1974)

Respondent Leun was appointed to the Department on July 11, 1988
Respondent Herbst was appointed to the Department on July 1, 2002 Information from
their personnel folders that was considered in making the penalty recommendations is
contained in the attached confidential memoranda

This case demonstrates some of the difficulties and stresses of patrol work In the
initial phase of this case, both officers, but particularly respondent Herbst, dealt patiently
with the situation created by a very intoxicated and troubled woman, Rivera Later on
they returned to the scene and both officers, but again in particular respondent Herbst,
handled the situation well by getting the then-raving Rivera into an ambulance It is in
the few moments of their second encounter with Rivera that things went very badly The
respondents in this case can be seen leaving the scene of an incident in which Rivera is
left lying on the ground This is antithetical to what police work is about It is
that both respondents each receive a penalty involving the loss of 15
vacation days

APPROVED
DEC 20 2011

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully Submitted,

Martin G. Karopkin
Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHELE HERBST
TAX REGISTRY NO 930338
DISCIPLINARY CASE NO 84329/08

In 2009 and 2010, respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" on her annual performance evaluation. She was rated 4.0 "Highly Competent" in 2007. She has been awarded one medal for Excellent Police Duty. [REDACTED]

[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration


Martin G. Karopkin
Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From Deputy Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHAEL LEUN
TAX REGISTRY NO 894739
DISCIPLINARY CASE NO 84330/08

Respondent received an overall rating of 3.0 "Competent" on his last three annual performance evaluations. He has been awarded five medals for Excellent Police Duty and one medal for Meritorious Police Duty. [REDACTED]

[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration


Martin G. Karopkin
Deputy Commissioner [REDACTED] Trials